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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM HAMPTON ROESING, Defendant and Appellant.	F062765 (Super. Ct. No. F11900708) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Gary R. Orozco, Judge.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Detjen, J., and Franson, J.

It was alleged in an information filed March 7, 2011, that appellant, William Hampton Roesing, committed second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)) and that he had served two separate prison terms for prior felony convictions (Pen. Code, § 667.5, subd. (b)). A jury convicted appellant of the lesser included offense of grand theft from a person (Pen. Code, § 487, subd. (c)), and in a separate proceeding appellant admitted the two prior prison term enhancement allegations. The court imposed a prison term of four years, consisting of the two-year midterm on the substantive offense and one year on each of the two prior prison term enhancements.

On appeal appellant argues that the prosecution violated his constitutional right to due process of law by commenting on (1) his failure to testify in his defense (*Griffin* error)[1] and (2) his silence after he was advised of his right to remain silent (*Doyle* error).[2] He acknowledges that he has waived this claim by his counsel's failure to object below, but argues that this failure deprived him of his constitutional right to the effective assistance of counsel. Appellant also contends the court erred in failing to order the district attorney to file a petition for the commitment of appellant to the California Rehabilitation Center (CRC) pursuant to Welfare and Institutions Code section 3051 (section 3051). We affirm.

FACTS

Prosecution Case

On February 4, 2011 (February 4), at approximately 3:00 p.m., Rusty Sills was at a grocery store (the store) in Fresno with his wife.[3] Appellant, with whom Sills was acquainted from the methadone clinic they both frequented, had telephoned Sills "several

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1 See *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

2 See *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*).

3 Except as otherwise indicated, the "Prosecution Case" portion of our factual summary is taken from Sills's testimony.

times wanting money," and Sills had gone to the store both to shop and to meet with appellant. On direct examination, Sills testified he was not sure if appellant was asking for a loan, which would be repaid, or if he was asking that Sills "giv[e] him money out of generosity." On cross-examination, when asked if he (Sills) owed money to appellant, Sills testified, "either I owed him the money or I was helping him out and he was going to repay me." He further testified that it "would be fair to say" that he did not recall whether or not he owed appellant money.

Sills's wife entered the store first, and Sills and appellant followed. The two "[t]alked about money." At one point, inside the store, Sills removed a "wad" of currency from one of his pockets; he was "counting it," and "[the] next thing you know [appellant] comes up behind [Sills] and he [takes] ... [the] money."

After appellant "grabbed" the money, he "bolted and ran." Sills gave chase, yelling, "'He stole my money, he stole my money.'" Sills caught up with appellant outside the store, in the parking lot. Appellant "pushed [Sills] down." Sills caught up with appellant again in the parking lot, and again appellant pushed him down. Sills "swung at" appellant.

The chase continued, out to the street, "over the freeway," and back to the store parking lot. At that point, a police officer arrived on the scene. As he approached appellant and Sills, appellant "started to give [Sills his] money back." Sills told the officer appellant had robbed him.

Esther Torres testified to the following: She was at the store at approximately 3:00 p.m. on February 4 when she saw two persons, one of whom she identified as appellant, "getting into a fistfight." The other combatant, a "smaller person," yelled, "'help, somebody call 9-1-1, I'm being robbed.'" It appeared the smaller person "was getting beat up ...." Torres called 9-1-1.

Defense Case

Defense investigator Robert Rubio testified that he spoke to Sills at Sills's residence, and that Sills told him the following: He met with appellant at the store on February 4. Sills "was there to pay [appellant] some money." Sills could not recall how much money he owed appellant.

DISCUSSION

Ineffective Assistance of Counsel

As indicated above, appellant contends he was denied his right to the effective assistance of counsel by defense counsel's failure to object to instances of *Doyle* error and *Griffin* error. We first discuss appellant's claims of error under *Doyle* and *Griffin.* We then turn to appellant's claim of ineffective assistance of counsel.

The Supreme Court held in *Griffin* that "the Fifth Amendment ... forbids ... comment by the prosecution on the accused's silence ...." (*Griffin, supra,* 380 U.S. at p. 615.) "Under the rule in *Griffin,* error is committed whenever the prosecutor or the court comments, either directly or indirectly, upon defendant's failure to testify in his defense." (*People v. Medina* (1995) 11 Cal.4th 694, 755.) "The prosecutor's argument cannot refer to the absence of evidence that only the defendant's testimony could provide. [Citation.] The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citation.]" (*People v. Brady* (2010) 50 Cal.4th 547, 565-566.)

Our Supreme Court has also made clear that "'[t]he prosecutor cannot use the defendant's invocation of his right to remain silent or refusal to answer questions ... to impeach his credibility. [Citations.] [¶] To establish a violation of due process under *Doyle* the defendant must show that the prosecution inappropriately used his postarrest silence for impeachment purposes and the trial court permitted the prosecution to engage in such inquiry or argument.' [Citation.] 'To assess whether these questions constitute

Doyle error, we ask whether the prosecutor referred to the defendant's post-arrest silence so that the jury would draw "inferences of guilt from [the] defendant's decision to remain silent after ... arrest." [Citation.]' [Citation.]" (*People v. Hollinquest* (2010) 190 Cal.App.4th 1534, 1555-1556.)

Appellant bases his due process claims on three statements by the prosecutor in closing argument. In the first, the prosecutor referred to the following testimony of City of Fresno Police Officer Henry Okazaki: On February 4, during the course of investigating a report of a robbery, the officer made contact with appellant and "attempted to Mirandize him," but appellant "kept talking over [the officer] which made it difficult to complete the Miranda advisement."[4] Officer Okazaki indicated that "at that point [he] chose to terminate [the] interview and not get a statement from [appellant]."

The prosecutor stated: "What did Officer Okazaki say? He said 'I tried to talk to him, I tried to admonish him of certain rights, and he spoke over me and he would not cooperate.' I would submit to you that if this was a simple misunderstanding, and [appellant] really was owed that money, 45 minutes after he's been sitting in a squad car he would just say, 'Officer, that guy owed me money, I took what I thought was mine.' If that were the evidence in the case, you would have heard it. But we didn't hear that."

Second, the prosecutor told the jury: "If you think that [appellant] was there and these circumstances show that he was just collecting the money he was owed, even though there has not been one shred of evidence, how much money, why it was owed, who it was owed to, when it was loaned. Despite the fact that the defense never brought any of that evidence into you, if that's what you believe, then find him not guilty."

Finally, appellant finds fault with the following statement by the prosecutor: "If the defendant obtained property under a claim of right, he did not have the intent required

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4 See *Miranda v. Arizona* (1966) 384 U.S. 436.

for the crime of theft or robbery. That's what 1863 asks you to consider.[5] It goes on to say, the defendant obtained property under a claim of right. If you believe in good faith that he had the right to a specific property or -- a very important 'or' there -- a specific amount of money and he openly took it. What specific amount of money could he have possibly thought -- think that he was entitled to? There has been zero evidence in that regard. Not one shred, not one mention by the defense or any of the witnesses. How much money was it that [appellant] was owed? Five bucks? Seven bucks? Nine bucks? Ten bucks? We don't know. That is why the defense does not apply to our case. The law is very clear. A specific amount of money. You would only be guessing as to how much money that was. There is absolutely no evidence as to this effect."

Appellant argues that the foregoing remarks by the prosecutor constituted comment on appellant's postarrest silence and his failure to testify, in violation of his Fifth Amendment rights. However, as appellant acknowledges, by failing to object to these remarks below he forfeited his *Griffin*- and *Doyle*-based claims on appeal. (*People v. Lancaster* (2007) 41 Cal.4th 50, 84 [*Griffin* error waived by failure to object]; *People v. Cornwell* (2005) 37 Cal.4th 50, 91, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*) [*Griffin* error waived by failure to object]; *People v. Crandell* (1988) 46 Cal.3d 833, 879, fn. 14, disapproved on another point in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365 [*Doyle* error waived by failure to object].) We turn now to appellant's claim that counsel's failure constituted ineffective assistance of counsel.

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5 The jury was instructed with CALCRIM No. 1863 on the claim-of-right defense, in relevant part, as follows: "If the defendant obtained property under a claim of right, he did not have the intent required for the crime of theft or robbery. [¶] The defendant obtained property under a claim of right if he believed in good faith he had a right to the specific property or a specific amount of money, and he openly took it."

"The burden of proving ineffective assistance of counsel is on the defendant." (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) To meet this burden, "a defendant must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to defendant ...." (*People v. Lewis* (2001) 25 Cal.4th 610, 674.) Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*In re Sixto* (1989) 48 Cal.3d 1247, 1257.) Since the failure of either prong of an ineffective assistance of counsel claim is fatal to establishing the claim, we need not address both prongs if we conclude appellant cannot prevail on one of them. (*People v. Cox* (1991) 53 Cal.3d 618, 656, disapproved on other grounds in *Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) "In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.) We conclude appellant has not made the required showing of prejudice.[6]

"[A] defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." (*People v. Tufunga* (1999) 21 Cal.4th 935, 938 (*Tufunga*).) Appellant raised this defense—commonly called the claim-of-right defense—in the instant case. He suggests the prosecutor's comments, quoted above, told the jury that appellant's failure to testify and his silence at the time of his arrest cast doubt on his claim, asserted at trial, that Sills owed him money. Implicit in this claim is

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6 We express no opinion as to whether the *Doyle* error or *Griffin* error occurred, or whether counsel's failure to object on those grounds was objectively reasonable.

the further claim that if he was merely trying to collect a debt, he did not have the intent necessary for a conviction of theft. This assertion is without merit.

In rejecting the availability of a claim-of-right defense when a robbery is accomplished to satisfy a debt, the court in *Tufunga* invoked the following principal: "'The law does not contemplate the use of criminal process as a means of collecting a debt. To invoke such process for the purpose named is, as held by all authorities, contrary to public policy. Hence, good faith, or the fact that the end accomplished by such means is rightful, cannot avail one as a defense in such prosecution, any more than such facts would constitute a defense where one compels payment of a just debt by the threat to do an unlawful injury to the person of his debtor.' [Citation.]" (*Tufunga*, *supra*, 21 Cal.4th at p. 956, italics omitted.) The court quoted with approval a Wisconsin Supreme Court case, which also declined to allow a claim-of-right defense for debt collection in a robbery prosecution: "'*The distinction between specific personal property and money in general is important*. A debtor can owe another $150 but *the $150 in the debtor's pocket is not the specific property of the creditor*. One has the intention to steal when he takes money from another's possession against the possessor's consent even though he also intends to apply the stolen money to a debt. The efficacy of self-help by force to enforce a bona fide claim for money does not negate the intent to commit robbery. Can one break into a bank and take money so long as he does not take more than the balance in his savings or checking account? Under the majority rule [as it then existed, allowing a claim of right defense to any robbery] the accused must make change to be sure he collects no more than the amount he believes is due him on the debt. A debt is a relationship and in respect to money seldom finds itself embedded in specific coins and currency of the realm. Consequently, taking money from a debtor by force to pay a debt is robbery. The creditor has no such right of appropriation and allocation.' [Citation.]" (*Id*. at pp. 954-955, italics added.)

Applying its holding that a claim-of-right defense cannot be used to justify a robbery for the alleged purpose of collecting a debt, the *Tufunga* court concluded that the defense was available in that case because, according to the defendant's version of events, he was not taking property to collect on a debt, but rather retrieving the specific money that he had brought to the alleged robbery victim's house. In *Tufunga*, the defendant testified that he was paid $200 in cash on the day of the alleged robbery by his employer/relative, who corroborated that fact, and brought that money to his ex-wife's house, putting it on the coffee table and stating it was to help pay a bill. (*Tufunga*, *supra*, 21 Cal.4th at p. 941.) When the defendant and his ex-wife began to argue, and his former mother-in-law went to call 911, the defendant's ex-wife took the money and put it in her bra. (*Id*. at pp. 941-942.) The defendant believed that his ex-wife would give the money to her mother and that the two were out to take the money. (*Id*. at p. 942.) Although the defendant demanded the money, his ex-wife refused, and he wrestled with her, reached into her bra and took it back. (*Ibid.*) Based on these facts, the Supreme Court concluded that the defendant could assert a claim-of-right defense because, if his version of the events were believed, "he brought $200 into the victim's home and took back the same currency upon fleeing." (*Id*. at pp. 944-945.)

The instant case differs from *Tufunga* in that here there was no evidence from which the jury reasonably could conclude that appellant sought to recover specific property. Rather, the evidence shows that although appellant may have been seeking to collect a debt that he believed, in good faith, he was owed, he was trying to do so through "'*the use of criminal process ....*'" (*Tufunga*, *supra*, 21 Cal.4th at p. 956.) Under these circumstances, under *Tufunga*, a claim-of-right defense was not available. Therefore, it is of no moment that the prosecutor's remarks, quoted above, cast doubt on the validity of such a defense. And from this point it follows that it is not reasonably probable that

objection by defense counsel to those remarks would have led to a result more favorable to appellant.

Section 3051

Appellant contends the court abused its discretion in failing to direct the district attorney to initiate civil commitment proceedings under section 3051. The People counter that appellant has forfeited this claim by failing to raise it below. The People are correct.

Statutory Framework

"Section 3000 et seq. establishes a program for the nonpunitive treatment and control of narcotics addicts, including persons convicted of criminal offenses, implemented by periods of treatment within CRC and outpatient supervision." (*People v. Cruz* (1990) 217 Cal.App.3d 413, 419.) Section 3051 "vests discretion in the trial court to determine whether evaluation for commitment to CRC is appropriate." (*People v. Masters* (2002) 96 Cal.App.4th 700, 703-704.)

Section 3051 provides in relevant part: "Upon conviction of a defendant for a felony, … if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics the judge shall suspend the execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Director of Corrections for confinement in the narcotic detention, treatment, and rehabilitation facility unless, in the opinion of the judge, the defendant's record and probation report indicate such a pattern of criminality that he or she does not constitute a fit subject for commitment under this section."

Procedural Background

The report of the probation officer indicates that appellant, who was 29 years old at the time of sentencing, told the probation officer the following: He first used alcohol at the age of 13, and "[b]etween his teenage years and the age of 26, he was an alcoholic." He has used marijuana, cocaine, methamphetamine and heroin. He has been using methadone since he turned 18. On February 4, "he had Klonipin, methadone, and cocaine in his system."

At sentencing, defense counsel told the court: "We would ask for probation.… [¶] ... [¶] [Appellant] is requesting the opportunity to participate in a program. [¶] ... [¶] He ... is requesting the opportunity to participate in a program. He does have family, a minor children and wife, who is very supportive of him. So we would request a program and probation."

Analysis

As appellant acknowledges, an appellate challenge to a trial court's failure to direct the district attorney to initiate CRC commitment proceedings is waived by a defendant's failure to raise the claim in the trial court. (*People v. Lizarraga* (2003) 110 Cal.App.4th 689, 690; *People v. Planavsky* (1995) 40 Cal.App.4th 1300, 1305-1315.) Appellant argues that although there was no mention of CRC or section 3051 proceedings in the trial court, counsel's request for a "program" preserved his claim for appeal. We disagree.

Here, appellant requested probation. Probation is part of the criminal process. At sentencing, the court's choices include a grant of probation or imposition of a prison sentence. (See Cal. Rules of Court, rules 4.411-4.420.) As indicated above, however, the CRC commitment process requires suspension of criminal proceedings. (§ 3051.) Because appellant specifically requested a disposition that presupposes the continuation of criminal proceedings, his further request for a "program" cannot reasonably be

construed as a request for CRC commitment. For this reason, and because appellant did not otherwise mention the civil commitment process for drug addicts, appellant waived his claim that the court erred in failing to direct the district attorney to initiate civil commitment proceedings.

DISPOSITION

The judgment is affirmed.